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3 **NOT FOR CITATION**

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6 **UNITED STATES DISTRICT COURT**  
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8 **NORTHERN DISTRICT OF CALIFORNIA**

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ERIC D. DOTSON,

No. C 01-4048 PJH (PR)

Petitioner,

**ORDER DENYING PETITION  
FOR WRIT OF HABEAS  
CORPUS**

vs.

GAIL LEWIS, Warden,

Respondent.

/

This is a habeas corpus case filed by a state prisoner pursuant to 28 U.S.C. § 2254.

The court ordered respondent to show cause why the writ should not be granted.

Respondent has filed an answer and a memorandum of points and authorities in support of it, and has lodged exhibits with the court. Petitioner has filed a traverse. The matter is submitted.

19 **BACKGROUND**

20 An Alameda County jury convicted petitioner of attempted murder, residential  
21 robbery in concert, carjacking, burglary, and shooting at an occupied vehicle. With  
22 enhancements for being armed with a deadly weapon, use of a firearm, and infliction of  
23 great bodily injury, he was sentenced to prison for thirty-two years. He unsuccessfully  
24 appealed his conviction to the California Court of Appeal, which affirmed, and the Supreme  
25 Court of California denied his petition for review.

26 As grounds for habeas relief, petitioner asserts that: (1) His Fifth Amendment and  
27 *Miranda* rights were violated when police failed to honor his invocation of his right to  
28 counsel; (2) the evidence is insufficient to prove his intent to kill the victim; and (3) his due

1 process rights were violated when his co-defendant's counsel engaged in misconduct.

2 The following facts are taken from the California Court of Appeal opinion.

3 At about 11 a.m. on December 23, 1995, Kathy Manucal arrived at her  
4 condominium in Fremont, opened her garage door with an automatic opener,  
5 and pulled her BMW automobile into the garage. She retrieved some  
6 luggage from the car's trunk, and then left the garage door open while she  
7 went through a door into the condominium's kitchen. She put her purse and  
8 keys on the kitchen counter and took the luggage upstairs to unpack.

9 While Manucal was upstairs, her doorbell rang; when she opened the  
10 door, a black woman she did not know, whom she identified at trial as Tamika  
11 Williams, asked if she knew where someone named Victoria or Valeria lived.  
12 Manucal said she did not know that person and closed the door. Manucal  
13 had an "eerie feeling" about Williams, who had looked over toward the garage  
14 while at the front door, and Manucal immediately felt the need to close the  
15 outer garage door so she could lock herself into her home.

16 She went to the door leading from the kitchen to the garage and  
17 opened the door just enough to put her arm through to reach the garage door  
18 switch. She saw a man with a white mask at the kitchen door; she tried to  
19 fight him off and shut the door, but he was too strong. The man forced the  
20 door open further and pressed a gun against Manucal's neck; the gun was in  
21 his left hand and she saw from his wrist that he was black. She struggled  
22 with him and managed to push his hand up away from her neck. During the  
23 struggle, Manucal saw another man who was also wearing a mask standing  
24 by the driver's side of her car.

25 After she got the gun away from her neck, Manucal heard a bang and  
26 the next thing she knew she was lying on the floor, unable to move from the  
27 neck down. She realized she had been shot. She heard car doors shut two  
28 or three times, heard the engine turn on, and heard her car leaving the  
garage.

17 Ex. A at 2-3.

18 Half an hour later, Manucal's son, Kevin, arrived and found the garage door open  
19 and his mother's BMW gone. When he opened the interior garage door into the kitchen, he  
20 saw his mother lying on the floor just inside the door; she was bleeding from the head. He  
21 called 911. Manucal, who had been shot in the head and finger, was hospitalized for three  
22 months. At the time of trial, Manucal still could not walk and her trunk muscles were very  
23 weak, despite almost daily physical therapy. *Id.* at 3.

24 Fremont police sergeant Daniel Pasquale responded to Kevin Manucal's 911 call.  
25 Kathy Manucal had a bullet entry wound on the top of her head. He believed the head  
26 wound was not a contact wound, but the result of a ricochet. *Id.* at 4.

27 On the evening of December 23, 1995, police located Manucal's BMW in Stockton.  
28

1 Stockton police officers arrested petitioner and Murray, who were inside the BMW. During  
2 a pat-down search, petitioner said that his “life was over” and that the police had caught  
3 him. Among the items police found were a set of keys in petitioner’s pocket for a rented  
4 teal green van and a .38 revolver under the driver’s seat of the BMW, which proved to have  
5 fired the two bullets recovered from Manucal’s home. *Id.* at 4-5.

6 In an interview with police, petitioner admitted that he took the revolver. When  
7 Manucal opened the door, petitioner, who had never fired the gun before, waved it at her.  
8 He panicked and heard the gun explode a couple of times and ran back to the van. *Id.* at  
9 11.

10 Gina Duncan was a friend of Tamika Williams, one of the co-defendants. On the  
11 evening of December 22, 1995, Williams came to Duncan’s boyfriend’s house and asked  
12 Duncan if she wanted to go for a ride. Duncan got inside a bluish colored van; inside were  
13 Murray and petitioner. *Id.* at 6.

14 Murray drove them to a shopping mall. Petitioner said something about a “jack” and  
15 Duncan said she wanted to go home because she knew someone was going to get hurt.  
16 While the van was in the parking lot, she saw petitioner remove a .38 handgun and two  
17 masks from a gym bag. *Id.* at 6.

18 The next day, the four of them drove to a mall in the van. At the mall, petitioner gave  
19 Duncan a credit card with the name Kathy M\_\_\_\_\_ on it, and Duncan and Williams went  
20 into a store. Duncan tried to buy a watch, but the salesperson returned the card and told  
21 her the card was inactive. *Id.* at 6-7.

22 Also admitted was evidence of an incident earlier that day. The court of appeal  
23 described it thus:

24 Arnold Estores/Nandy Palumpon Incident

25 At about 2 a.m. on the morning of December 23, 1995, in Fremont, as Nandy  
26 Palumpon was driving and Arnold Estores was a passenger in a BMW automobile,  
27 Estores noticed they were being tailgated. When they pulled over to let the vehicle  
28 pass, the passenger in the vehicle – which Estores saw was a bluish-green van –  
who was wearing a black ski mask, leaned out and shot several times at the lower  
part of their car with a rifle-type gun. Palumpon slammed on the brakes and stopped

1 the car; the van stopped in front of them. Estores then saw a figure looking back at  
2 them from the driver's side window. Palumpon accelerated quickly past the van, and  
3 the van started following them again. When they got into an area with lots of traffic,  
4 the van turned around and drove away. They later saw a hole in the front fender of  
5 the BMW and a hole in the back fender; a headlight was out and two tires were flat.  
6 They reported the incident to police.

7 Two shell casings found in the rented van were determined to have been fired  
8 from the .22 rifle found in Dotson's bedroom. Gunshot residue similar in composition  
9 to the shell casings was found on the right front window and right front passenger  
10 seat of the van. In Williams's taped statement that was played for the jury, she said  
11 that she had been lying in the back of the van, while the van was going down the  
12 road, when she heard some shots fired.

13 *Id.* at 7.

## DISCUSSION

### A. Standard of review

1 A district court may not grant a petition challenging a state conviction or sentence on  
2 the basis of a claim that was reviewed on the merits in state court unless the state court's  
3 adjudication of the claim: "(1) resulted in a decision that was contrary to, or involved an  
4 unreasonable application of, clearly established Federal law, as determined by the  
5 Supreme Court of the United States; or (2) resulted in a decision that was based on an  
6 unreasonable determination of the facts in light of the evidence presented in the State court  
7 proceeding." 28 U.S.C. § 2254(d). The first prong applies both to questions of law and to  
8 mixed questions of law and fact, *Williams (Terry) v. Taylor*, 529 U.S. 362, 407-09 (2001),  
9 while the second prong applies to decisions based on factual determinations, *Miller-El v.*  
10 *Cockrell*, 123 S.Ct. 1029, 1041 (2003).

11 A state court decision is "contrary to" Supreme Court authority, that is, falls under the  
12 first clause of § 2254(d)(1), only if "the state court arrives at a conclusion opposite to that  
13 reached by [the Supreme] Court on a question of law or if the state court decides a case  
14 differently than [the Supreme] Court has on a set of materially indistinguishable facts."  
15 *Williams (Terry)*, 529 U.S. at 412-13. A state court decision is an "unreasonable application  
16 of" Supreme Court authority, falls under the second clause of § 2254(d)(1), if it correctly  
17 identifies the governing legal principle from the Supreme Court's decisions but

1 "unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413. The  
2 federal court on habeas review may not issue the writ "simply because that court concludes  
3 in its independent judgment that the relevant state-court decision applied clearly  
4 established federal law erroneously or incorrectly." *Id.* at 411. Rather, the application must  
5 be "objectively unreasonable" to support granting the writ. See *id.* at 409.

6 Under 28 U.S.C. § 2254(d)(2), a state court decision "based on a factual  
7 determination will not be overturned on factual grounds unless objectively unreasonable in  
8 light of the evidence presented in the state-court proceeding." *Miller-El*, 123 S.Ct. at 1041.

9 Where there is no reasoned opinion from the highest state court to consider the  
10 petitioner's claims, the court looks to the last reasoned opinion, in this case that of the  
11 California Court of Appeal. *Yist v. Nunnemaker*, 501 U.S. 797, 801-806 (1991).

12 *B. Issues Presented*

13 1. *Edwards* claims

14 Petitioner contends that the investigating officers failed to honor his invocation of his  
15 right to counsel when they asked him to consent to a search. He also contends that they  
16 failed to honor his subsequent invocation of his right to stop an interrogation.

17 A suspect who has expressed a desire to have counsel present during custodial  
18 interrogation is not subject to further interrogation by the authorities until counsel is made  
19 available to the suspect. *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981). Authorities  
20 may continue the interrogation if the accused himself voluntarily initiates further  
21 communication, *Oregon v. Bradshaw*, 462 U.S. 1039, 1045-46 (1983), or if the suspect  
22 does not clearly request an attorney, see *Davis v. United States*, 512 U.S. 452, 459-62  
23 (1994) (suspect must unambiguously request counsel; "Maybe I should talk to a lawyer"  
24 insufficient).

25 a. Consent to Search

26 Petitioner contends his conviction must be reversed because police violated  
27 *Edwards* when they asked him for consent to search his home after he had invoked his  
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1 right to counsel.

2 Petitioner requested that an attorney be present when he talked to Fremont police  
3 detectives Jeff Swadener and Ken Bingamen. Ex. A at 8-9. The officers then gave a  
4 *Miranda* warning and ceased questioning. *Id.* About thirty minutes later the officers asked  
5 for permission to search petitioner's home and the teal minivan, which petitioner gave with  
6 the caveat that he be present. *Id.* at 9. No attempt was made to interview him. *Id.* Inside  
7 the minivan, detectives found a rental agreement in petitioner's name and a Fremont gas  
8 station receipt in the name of Scott Page. *Id.* at 5. When detectives went to petitioner's  
9 home, they found a .22 caliber rifle under a mattress in the master bedroom. *Id.*

10 The request for consent to search was not "interrogation" within the meaning of  
11 *Edwards*, so there was no violation. See *United States v. LaGrone*, 43 F.3d 332, 337 (7<sup>th</sup>  
12 Cir. 1994) (request to consent to search not interrogation); *United States v. Hidalgo*, 7 F.3d  
13 1566, 1568 (11th Cir. 1993); *United States v. Rodriguez-Garcia*, 983 F.2d 1563, 1568 (10th  
14 Cir. 1993) ("[e]very federal circuit court which has addressed the *Miranda* issue presented  
15 here has reached the conclusion that a consent to search is not an incriminating  
16 statement."); *Cody v. Solem*, 755 F.2d 1323, 1330 (8th Cir. 1985).

17 In addition, petitioner may be trying to contend that the statement he made in the  
18 police car on the way to Fremont, described below, should have been suppressed as being  
19 the fruit of the allegedly improper request for consent to search, in the sense that he would  
20 not have been in the car if the police had not asked for permission to search. For the  
21 reasons set out above, the predicate for this claim -- that the request for consent was  
22 improper -- has been rejected, so the conclusion does not follow.

23 b. Post-search questioning

24 After the search the detectives transported petitioner to Fremont. Ex. A at 9.

25 During the ride, Dotson spontaneously said, "It wasn't supposed to  
26 happen that way." The officers did not respond and Dotson repeated the  
27 same statement a number of times. He then added, "All we wanted was the  
28 car." Swadener admonished Dotson several times to remain quiet, saying he  
was in no position to take a statement from him at that time. He also  
reminded Dotson that he had invoked his right to remain silent and that

1 Swadener could not speak with him. He added that if Dotson wanted to  
2 speak to him, he could do so when they got to the Fremont police station.

3 When they arrived at the Fremont police station, Swadener took  
4 Dotson to an interview room and asked Dotson if he still wanted to give a  
5 statement; Dotson said he did. Swadener then readvised Dotson of his  
6 *Miranda* rights. Dotson consented to an interview and signed an admonition  
7 and waiver form at 7:25 a.m. During the taped interview, Dotson  
8 acknowledged that he had rented the van, that he had driven from Stockton to  
9 Fremont with Murray and a woman whose name he did not know, that they  
10 had his rifle and Murray's gun in the van, and that they were hoping to scare  
11 someone into giving them some money. Dotson became very emotional  
12 when the questioning got close to the point of the robbery and shooting of  
13 Manucal. When Swadener asked what happened after they left the Motel 6  
14 on the morning of December 23, Dotson said, "I was makin' every excuse to  
15 go home. But I'd like to stop now." Swadener responded, 'Want to compose  
16 yourself?' Dotson again said, "I'd like to stop now." After a short pause, the  
17 detectives continued asking -- and Dotson continued answering -- questions  
18 about the events leading up to the shooting of Manucal. When questioning  
began to focus on the shooting itself, Dotson again asked to stop the  
interview:

19 [Dotson:] "I'd like to stop now."

20 (long pause)

21 [Swadener:] "Eric, we can stop right here if you want to."

22 [Dotson:] "Yes. Yes. Stop now."

23 [Swadener:] "OK, there's still a question about who fired the gun. Never  
mind."

24 [Bingaman:] "You want to stop and leave it at that or do you want to tell us  
25 who fired the gun? Hmm?"

26 [Dotson: "Stop, leave it like that."]

27 [Swadener:] "So up to this point, we know you and Chris are standing in the  
garage and gunshots go off. But you don't want to tell us which one of you  
was pulling the trigger?"

28 [Dotson:] "Want to stop now please?"

29 [Swadener:] "OK. We will conclude the interview at 7:55, December 24,  
1996."

30 Shortly thereafter, Swadener took Dotson downstairs to the jail for  
31 booking. Before leaving Dotson in the jail, Swadener reminded Dotson of his  
32 name and the fact that he would be upstairs in his office, and said that if  
33 Dotson wished to converse further about anything, he could inform jail  
34 personnel. About half an hour later, Swadener was told that Dotson had  
35 requested that Swadener come back down to the jail to contact him.  
36 Swadener asked Dotson what he wanted, and Dotson said he wanted to  
37 continue speaking with Swadener. At that point, Dotson was still emotional,  
38 but was no longer crying and seemed to have regained his composure.

39 During this portion of the interview . . . Dotson admitted that he had  
40 taken the revolver and Murray had taken the .22 rifle into the garage. When  
41 Manucal opened the door, Dotson, who had never fired a gun before, waved  
42 the gun at her. He panicked and heard the gun "explode" a couple of times;  
43 he then ran back to the van. Murray drove the van and the woman drove  
44 Manucal's BMW back to Stockton.

45  
46  
47 Ex. A at 9-11.

1       The California Court of Appeal analyzed the events at the police station as two  
2 requests to stop the questioning, the first when Swadener asked if petitioner wanted to  
3 compose himself, and the second in the quoted portion of the interview above.

4       Petitioner became emotional when he reached the point of discussing the shooting  
5 of Maniscal. *Id.* at 15. It was at this point that he first asked to stop. *Id.* The interview  
6 paused, with the tape running, while he composed himself. *Id.* He then continued for a bit.  
7 *Id.* The trial court found that this request to stop was caused by his loss of composure,  
8 "that the request was caused by Dotson's loss of composure and was essentially a request  
9 for an intermission, which detective Swadener provided and which allowed petitioner to  
10 regain his composure and continue talking., at least temporarily." *Id.* The court of appeal  
11 concluded that the evidence was sufficient to support the trial court's finding the request to  
12 stop did not amount to an invocation of petitioner's right to stop interrogation. *Id.* at 15.  
13 This finding of fact was not an unreasonable determination of the facts as presented in the  
14 state court.

15       The second series of requests to stop interrogation occurred after petitioner  
16 composed himself and resumed answering questions about the events leading up to the  
17 shooting of Maniscal. As the court of appeal said, the "police may well have been  
18 excessive in their attempts to continue questioning Dotson . . ." *Id.* But their efforts were  
19 unsuccessful; petitioner said nothing more.

20       Swadener then took petitioner downstairs to the jail for booking. Before leaving, the  
21 officer told petitioner his name and said that if petitioner had any further desire to talk to  
22 him, he should inform jail personnel. A half hour later, Swadener was informed that  
23 petitioner had requested that Swadener contact petitioner. Petitioner was still emotional,  
24 but was no longer crying and seemed to have regained his composure. The interview  
25 resumed about thirty minutes after that, and petitioner made incriminating statements  
26 regarding his involvement in the crime.

27       The California Court of Appeal concluded that petitioner had sufficient time to reflect,  
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1 outside the presence of the detectives, on whether he wanted to continue talking to them,  
2 so that his request to resume the interview was not tainted by the detectives' earlier failure  
3 to immediately cease the interrogation when asked to stop. *Id.*

4       Although the officers may well have violated petitioner's *Edwards* rights when they  
5 pressed him to say who had pulled the trigger after he asked to stop, petitioner did not  
6 answer, so there was no evidence to be suppressed as to that incident. The only  
7 remaining question, then, is whether the officers' failure to honor petitioner's request to stop  
8 carried over to the renewed questioning after petitioner had been booked.

9       After a suspect invokes his *Edwards* rights, authorities may nevertheless interrogate  
10 him if the accused himself voluntarily initiates further communication. *Oregon v. Bradshaw*,  
11 462 U.S. 1039, 1045-46 (1983). It is clear that petitioner did so here; he initiated the  
12 renewed contact by asking to talk to the officer, and had a total of an hour between the end  
13 of the first interview session and the beginning of the second, time in which not only to  
14 compose himself but also to reflect on whether he wanted to talk to the police without a  
15 lawyer present.

16       The California appellate courts' rejection of his claim was not contrary to, nor an  
17 unreasonable application of, clearly established United States Supreme Court authority.

18       2. Sufficiency of the evidence

19       Petitioner asserts that there was insufficient evidence to prove specific intent to kill  
20 Maniscal. He contends that he did not try to shoot Maniscal, but rather the gun discharged  
21 when they struggled for control of the gun. He supports his contention by indicating that  
22 the bullet did not directly strike Maniscal, but instead ricocheted off the wall which then hit  
23 Maniscal. The court is not persuaded.

24       A state prisoner who alleges that the evidence in support of his state conviction  
25 cannot be fairly characterized as sufficient to have led a rational trier of fact to find guilt  
26 beyond a reasonable doubt states a constitutional claim, *Jackson v. Virginia*, 443 U.S. 307,  
27 321 (1979), which, if proven, entitles him to federal habeas relief, *id.* at 324. A federal court  
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1 reviewing collaterally a state court conviction does not determine whether it is satisfied that  
2 the evidence established guilt beyond a reasonable doubt. *Payne v. Borg*, 982 F.2d 335,  
3 338 (9th Cir. 1992). The federal court "determines only whether, 'after viewing the  
4 evidence in the light most favorable to the prosecution, any rational trier of fact could have  
5 found the essential elements of the crime beyond a reasonable doubt.'" *Id.* (quoting  
6 *Jackson*, 443 U.S. at 319). After AEDPA, a federal habeas court applies the standards of  
7 *Jackson* with an additional layer of deference. *Juan H. v. Allen*, 408 F.3d 1262, 1274 (9th  
8 Cir. 2005). Generally, a federal habeas court must ask whether the operative state court  
9 decision reflected an unreasonable application of *Jackson* to the facts of the case. *Id.* 1275  
10 (quoting 28 U.S.C. § 2254(d)).

11 Here, there was sufficient evidence to prove that petitioner had an intent to kill  
12 Manucal. The Court of Appeal noted that when Manucal opened the door to the garage  
13 and saw a man wearing a mask, she tried to fight him off and shut the door, but he was too  
14 strong. He forced the door open further and pressed a gun against her neck. Although she  
15 managed to push his hand away from her neck, he fired several shots. The one that hit her  
16 in the head was likely a ricochet shot. It is not surprising that he did not hit her with a direct  
17 shot because Manucal was pushing his hand away from her neck when he pulled the  
18 trigger. That she was not hit directly is not necessarily evidence of petitioner's lack of intent  
19 to kill, but may have been due to her efforts to defend herself. At least, a reasonable jury  
20 could have so found. If confronted by a record that supports conflicting inferences, a  
21 federal habeas court "must presume – even if it does not affirmatively appear on the record  
22 – that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer  
23 to that resolution." *Jackson*, 443 U.S. at 326. There was sufficient evidence to support the  
24 verdict.

25 The state appellate courts' rejection of petitioner's claim was not contrary to, nor was  
26 it an unreasonable application of, clearly established United States Supreme Court  
27 authority.

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1       3. Violation of due process rights from co-defendant's attorney's misconduct  
2       Petitioner contends that his due process rights to a fair trial were violated when his  
3 co-defendant's counsel engaged in misconduct by making improper remarks during closing  
4 argument.

5       The U.S. Supreme Court has defined the category of infractions that violate  
6 fundamental fairness very narrowly. *Estelle v. McGuire*, 502 U.S. 62 (1991). Beyond the  
7 specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited  
8 operation. *Id.* The issue is whether the claimed error so fatally infected the proceedings as  
9 to render them fundamentally unfair. *Jammal v. Van De Kamp*, 926 F.2d 918, 919 (9<sup>th</sup> Cir.  
10 1991). The acts complained of must be such as to necessarily prevent a fair trial.  
11 *Cacoperdo v. Demosthenes*, 37 F.3d 504, 509 (9<sup>th</sup> Cir. 1994).

12       Comment on a defendant's failure to testify -- not the issue here -- is improper when  
13 done by a prosecutor, *Griffin v. California*, 380 U.S. 609, 615 (1965), and has been held by  
14 courts of appeals also to be improper when done by the court or a co-defendant, *United  
15 States v. Patterson*, 819 F.2d 1495, 1506 (9th Cir. 1987). But there is no Supreme Court  
16 authority that comment by anyone other than a prosecutor on failure to testify is a  
17 constitutional violation, and no authority that comments of the sort at issue here, by  
18 whomever made, are a violation. As a result, these claims cannot be the basis for federal  
19 habeas relief.

20       Alternatively, for the reasons discussed below, the court concludes that co-  
21 defendant's counsel's remarks were harmless.

22       a. First claimed instance of misconduct

23       Petitioner contends that his co-defendant's counsel's remarks were improper when  
24 counsel characterized petitioner as a sick jerk. Ex. A at 19. Petitioner's counsel objected.  
25 The court sustained the objection and directed the jury to disregard the remark. Jurors are  
26 presumed to follow their instructions, *Weeks v. Angelone*, 528 U.S. 225, 234 (2000), and  
27 petitioner has not rebutted the presumption. The admonition of the jury cured any  
28

1 prejudice.

2       Even if the jury did not follow the trial court's admonition, petitioner was not  
3 prejudiced. The potential effects of counsel characterizing petitioner as a sick jerk were  
4 minimal when compared to the evidence properly admitted against petitioner. Gina Duncan  
5 identified petitioner as the man in the van with Williams and Murray the night before the  
6 crimes and as the person who talked about a "jack" and pulled two masks and a .38 gun  
7 from a bag in the van. The following day, petitioner gave Manucal's credit card to Duncan  
8 and told her to try to buy something with it. Petitioner was arrested in Manucal's car, along  
9 with Murray. Petitioner also had the keys to the minivan and a rental agreement for the van  
10 which was found in his name. The .22 rifle implicated in the car shooting was found in his  
11 home. He made several incriminating remarks to police at the time of his arrest and  
12 afterwards, and even admitted in a taped statement that he went to Manucal's house, fired  
13 the .38 gun, and fled.

14       Given the strength of the case against petitioner, it is clear that Murray's counsel's  
15 objectionable argument did not contribute to the verdict.

16           b. Second Claim

17       Petitioner next asserts that his co-defendant's counsel engaged in misconduct when  
18 counsel discussed matters not in evidence.

19       Co-defendant's counsel argued that "[Murray] was not there. He reported his gun  
20 stolen weeks before, gave it, sold it to Dotson. I can't argue[,] it's not in evidence and  
21 nobody put – let's assume we know he sold it or got rid of it or Dotson had it. He's  
22 responsible for that. He's –" Ex. A at 20. The prosecutor objected and the court  
23 admonished Murray's counsel to confine himself to the evidence. *Id.*

24       Petitioner's counsel did not object. As a result, respondent contends that this claim  
25 is procedurally barred. The Ninth Circuit has recognized and applied the California  
26 contemporaneous objection rule in affirming denial of a federal petition on grounds of  
27 procedural default where there was a complete failure to object at trial. *Vansickel v. White*,

1 166 F.3d 953, 957-58 (9th Cir. 1999). Petitioner has not attempted to avoid the default by  
2 showing cause and prejudice. As a result, this claim is procedurally barred.

3 In addition, although petitioner's counsel did not object and did not ask for an  
4 admonition, as a result of the prosecutor's objection an admonition was given. There was  
5 no prejudice.

6 c. Third Claim

7 Petitioner contends that co-defendant's counsel engaged in misconduct when  
8 counsel stated, "I'll tell you something. There is a reasonable doubt that he shot Kathy  
9 Manucal. And if you want to know the difference between reasonable doubt and a bunch of  
10 smoke, his defense is what is [sic] a bunch of smoke --." Ex. A at 20. Petitioner's counsel  
11 objected. The trial court sustained the objection. *Id.*

12 Although no admonition was requested or given, the objection was sustained, and  
13 the comment was actually rather mild, considering the evidence against Dotson. Any  
14 constitutional error in relation to this comment was harmless.

15 d. Fourth Claim

16 Petitioner asserts that co-defendant's counsel engaged in misconduct when counsel  
17 used Tamika Williams' statement to attempt to shift the blame to petitioner, arguing: "So  
18 she's talking about 'we.' You already know Chris is there. So she's arriving in the van.  
19 Who is she arriving with? It's we. She's arriving with him." Ex. A at 21. Petitioner's  
20 counsel objected, contending that the evidence was inadmissible against his client. *Id.*  
21 The trial court instructed the jury to disregard the last comment and admonished co-  
22 defendant's counsel to confine himself to the facts. *Id.*

23 Co-defendant's counsel then returned to the same line of argument: "Then the next  
24 thing that she says is well, my plan was to go home . . . "[B]ut well, I rode around Fremont  
25 in the van - did you end up stopping in Fremont anywhere? Yeah. We - We stopped well,  
26 yeah, we stopped, my plan was to go home but we stopped at some apartments." *Id.*  
27 Petitioner's counsel objected again and asked that the jury be admonished to disregard the  
28

1 references to "we." The trial court admonished the jury to disregard entirely all references  
2 just made and not consider them in their deliberations nor in their verdict. *Id.*

3 For the reasons discussed in the sections above, the objection and admonition  
4 cured any constitutional error. And, again as discussed above, the strength of the evidence  
5 against Dotson leads to the same conclusion. There was no prejudice.

6 The state appellate courts' rejection of these claims was not contrary to, nor an  
7 unreasonable application of, clearly established Supreme Court authority.

8 **CONCLUSION**

9 For the foregoing reasons, the petition for a writ of habeas corpus is **DENIED**. The  
10 clerk shall close the file.

11  
12 **IT IS SO ORDERED.**

13  
14 DATED: March 31, 2006.



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15 PHYLLIS J. HAMILTON  
16 United States District Judge

**United States District Court**

For the Northern District of California

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